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No. 197.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

ROBERT FOYE O'NEAL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

SUPPLEMENTAL BRIEF OF PETITIONER.

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We respectfully submit for filing this Supplemental Brief, feeling that the observations, comments and citations herein made are pertinent and material to a proper consideration and determination of the cause.

STATEMENT OF THE CASE.

In Respondent's Statement, p. 4, paragraph 1, it states that a prison warden, armed trusties and bloodhound dogs arrived at the scene within a few minutes. The evidence discloses that they arrived 30-45 minutes after being called (R. p. 60). Further in said paragraph, it states Petitioner surrendered only after a chase during which several warning shots were fired. To the contrary, the evidence shows Petitioner was standing beside a "public road" and fled only after shots were fired (R. p. 110). Shots were fired even before and/or simultaneously with a demand for surrender was made.

On p. 5, numerical paragraph 4, of Respondent's Brief, the circumstances of Cooper's possession and use of Petitioner's automobile are misquoted. Correctly, Cooper overheard a conversation between Petitioner and policeman Watson. Noting that Watson could not go fishing, and that Petitioner already had his fishing tackle, Cooper said, "I have some place to go; if you will let me use your car I will carry you fishing and pick you back up and show you where to fish". Petitioner said "yes". Cooper's use of the car was not conditioned upon Petitioner's being allowed to go fishing. Petitioner simply gratuitously allowed him to use the car. When noting the evidence about the car, it should be remembered that Petitioner's car was a distance of at least one-fourth—one-half mile from the still (R. p. 113).

The circumstances surrounding Padgett's and Cooper's emergence from the woods, and telling Petitioner of their flight from the still, are set forth on p. 110, the Record. Petitioner stated, "We stood there and talked a while, a few minutes. I didn't know where I was at and I couldn't get the relation to where my car was. I said "well, there is no use of standing here, let's go". We walked across

the road and we were standing by the road when all at once someone began to shoot at us and yelled. It was kind of behind me, and when I looked back there was a man with overalls on, a blue denim jacket and overalls; and he shot again. I looked, looked back around and Mr. Cooper and Mr. Padgett were running, and I, in turn, run".

On p. 6, Respondent's Brief, it states that "Petitioner's explanation had never been disclosed to any of the agents prior to trial". The observation is apparently made for whatever prejudicial effect it may have. In response, we ask that the Court note neither had the Government's case been made known to Petitioner. In fact, it refused to even name its witnesses.

REASONS FOR GRANTING THE WRIT.

I wish to comment on the Argument portion of Respondent's Brief, beginning on p. 6.

Paragraph 1 (a) states "They had probable cause to believe . . ." It should be noted that the number and identity of those fleeing the still were unknown. There is no evidence that the still was in a "sparsely populated area". Petitioner, in his Statement, mentioned the presence of a man fishing in the pond at which he was fishing at the time Padgett and Cooper came upon him after fleeing the still. This gentleman's house was approximately 100 feet from the pond. The attempt to equate prison Trusties with citizens, so as to place them within the right and authority of citizens to aid in the apprehension of fleeing suspects, is somewhat and in part weakened by the fact they were not even citizens. They did not even have this authority.

On p. 7, Respondent states no incriminating information was secured before Agent Barrett assumed custody. We

answer, "None would have been obtained had not an illegal arrest been made". Barrett did not make the initial arrest, the prison trusties did. The clothing and "items" found in the automobile, and their association with Defendant, would not have been known but for the statements made by the Defendant and Co-Defendants after their illegal arrest and detention, for whatever incriminating effect and significance they had.

On p. 8, Respondent states "Manifestly, he would have reasonably have anticipated the crux of the chemist's expert testimony". How? Defendant didn't even know of his existence nor had his testimony on the "items" been introduced in evidence at the previous trial of Padgett and Cooper (R. pp. 87, 88).

On p. 9, it is stated the instruction requested by Petitioner on the weight to be given circumstantial evidence would have been confusing and incorrect. This is preposterous. The requested instruction followed the citations of authority previously given in Petitioner's Motion for Rehearing and Petition for a Writ of Certiorari. A recent decision of the **Court of Appeals of Georgia, Leon Carr v. The State, Case No. 44,145**, decided March 3, 1969, yet unreported, restates the rule, "When a conviction rests on circumstantial evidence alone, and this evidence supports more than one theory—one consistent with the guilt of the accused and another with innocence—it does not exclude every other reasonable hypothesis except guilt and is not sufficient to prove the defendant's guilt beyond a reasonable doubt". On **p. 10** of the Opinion it reads, "To sustain a conviction on circumstantial evidence only, the State must prove facts that are not only consistent with the hypothesis of guilt of the accused, but the facts proved must exclude every other reasonable hypothesis". This argument and authority are applicable to Question 4 (b) of Petitioner's Petition for a Writ of Certiorari.

Beginning on p. 9, Respondent speaks of the Petitioner's request that an instruction be given on "mere presence at a still". The recent case of **Harris v. State, Case No. 44,371,** decided May 15, 1969, **Court of Appeals of Georgia,** yet to be reported, states that evidence of the defendant's presence at a still; that he raised a tin cover; stuck his hand inside and tasted the contents; is not sufficient to sustain a conviction of making liquor, these acts being consistent with idle curiosity. The decision cites **16 Ga. App. 291,** and supports their request. The citation is applicable to Questions 1, 3 and 4 (c) of Petitioner's Petition for a Writ of Certiorari.

CONCLUSION.

Petitioner and Counsel respectfully ask the Court's consideration of his Appeal, feeling it merits your attention. The legal principles seem so clear, perhaps Petitioner and his Counsel have overlooked additional and more authoritative argument, but humbly we ask your indulgence.

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Certificate of Service.

I hereby certify that I have served upon Erwin N. Griswald, Solicitor General, United States of America, five (5) copies of the within and foregoing Supplemental Brief,

by depositing the same in a properly addressed envelope with correct amount of postage affixed thereon in the United States Mail.

This 14th day of July, 1969.

.....

T. Malone Sharpe.